No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON, PETITIONER

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AND CENTRAL NEW YORK FAIR BUSINESS ASSOCATION AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. Central New York Fair Business Association (CNYFBA) is a member organization of CERA and is incorporated as a non-profit in Oneida, New York. CERF and CNYFBA are primarily writing this *amici curiae* brief to explain why the federal reserved rights doctrine must be limited by the structure of the Constitution as a matter of federalism to protect the individual rights of the people to self-governance at both the state and national level.[1]

CERF submits this second *amici curiae* brief in this case to explain how this Court can apply political accountability federalism as recently adopted in *Murphy v. NCAA*, 138 S.Ct. 1461 (2018) to limit the reach of the federal reserved rights doctrine. CERF believes this case demonstrates how the individual liberty of Mr. Sturgeon has been completely usurped by the National Park Service in asserting it can claim jurisdiction over the waterways of Alaska despite the

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amici curiae*, CERF, its members or its parent CERA's members including Central New York Fair Business, or its counsel have made any monetary contribution to the preparation or submission of this brief.

express language of Congress to the contrary. In its *amici curiae* brief for this case on petition CERF introduced facts from two newly located historic documents. The memorandum "Embargo on the Upper Rio Grande" explains how the federal reserved water rights doctrine was created through deliberate fraud by the United States. The second memorandum "Federal Irrigation Water Rights" explains how all waters can be subjected to federal authority using the plenary power that is the basis of the federal reserved rights doctrine. This memorandum is attached as an appendix to this *amici* brief. Counsel will use the federal government's own words to explain how the federal reserved rights doctrine has resulted in the complete denial of federalism and confronts the public trust doctrine authority of the State of Alaska and liberty interest of Mr. Sturgeon to traverse the navigable waterway with his hovercraft. Mr. Sturgeon filed a blanket consent and the United States consented by letter to the filing of this *amici curiae* brief.

SUMMARY OF THE ARGUMENT

CERF and CNYFBA are not going to repeat the arguments made in the *amici curiae* brief submitted to this Court at the petition stage. Whether or not this Court believes the federal reserved rights doctrine was created through fraud or not does not change the fact that the Ninth Circuit decision in this case has just expanded it to apply against all claims of state jurisdiction over waterways if the decision is upheld. While CERF supports the positions of Mr. Sturgeon and the State *amici* that the Ninth Circuit did not properly apply existing law and legal doctrines CERF will attempt to apply the political accountability

federalism argument used in *Murphy v. NCAA*, 138 S.Ct. 1461 (2018) to convince this Court that the Ninth Circuit decision should be reversed.

This Court correctly assumed that the Department of Justice was adhering to the federal Indian policy adopted by Congress following the Civil War. The 1871 Indian Policy was and is a war power policy. This policy continued the use of the war powers from the Civil War in the national government. Adhering to this policy, this Court deemed that the authority of Congress over the Indians was plenary. *See United States v. Kagama*, 118 U.S. 375 (1886). This Court allowed the Department of Justice to successfully assert that it had an overriding federal national interest to protect claimed rights of the Indians while it was suppressing them. Attorneys for DOJ created the federal reserved rights doctrine to further and enforce the plenary power of Congress. *See United States v. Winans*, 198 U.S. 371 (1906) and *Winters v. United States*, 207 U.S. 564 (1908). The United States represented by the Department of Justice (DOJ) implied that the federal reserved rights doctrine was necessary to prevent further Indian hostilities. The 1930 Federal Irrigation Water Rights Memorandum attached as an appendix to this brief explains just what it meant and means to the Department of Justice to have plenary authority over water from the reserved rights doctrine. The memorandum details using the war powers or plenary powers to assert federal jurisdiction to displace the constitutional powers that were supposed to be reserved to the States at statehood under the doctrine of federalism.

The decisions in *Kagama*, *Winans* and *Winters* stand in contradiction to this Court's decision defining the public trust doctrine as a matter of separation of

powers in *Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845) and other old water cases. This Court must reconsider prior precedent that violates this critical role of protecting the constitutional structure to restore federalism as a major component of the separation of powers doctrine embodied in the Constitution. This Court took a huge step toward restoring federalism in *Murphy v. NCAA* this past term. Justice Alito in writing the opinion of the court opined that the doctrine of federalism is contradicted by granting Congress plenary authority. To apply the anticommandeering mandate of *Murphy* to this case requires an examination of the constitutionality of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371 (16 U.S.C. 3101 et seq.) before addressing whether the National Park Service regulation legally preempts state jurisdiction. *Amici* believe that the authority for ANILCA can be clarified by this Court to permit a proper look at the constitutionality of the federal regulation that is actually supplanting state jurisdiction.

Addressing the plenary authority of Congress over the Indians should also include a short explanation in the opinion that the Constitution applies to all Native Americans living on the reservations and the American citizens living in other territories like Guam and Puerto Rico. There needs to be further explanation that political accountability federalism is not the "States Rights" federalism that should have ended with the Civil War.

ARGUMENT

Amici CERF and CNYFBA realize that this case concerns the expansion of the federal reserved water rights doctrine in Alaska. No modification of the

reserved rights doctrine is enforceable when the DOJ asserts that it constitutionally exercises plenary war powers for its client, the entire federal government. In order for this Court to address the federal reserved rights doctrine it must kill the body of the beast not just the latest head to sprout from the manipulations of the DOJ to apply the plenary power. As the Federal Irrigation memo demonstrates any limitation against the claim of extending the reserved rights doctrine by this Court will simply come back again under a slightly different analysis. That is why this case is back before this Court. *Sturgeon v. Frost*, 136 S. Ct 1061 (2016). The only way to stop this is to restore the constitutional structure. Restoring the constitutional structure requires revoking the consent to the use of the plenary power. This case is the ideal vehicle for correcting the misuse of the plenary power.

I. PLENARY POWER ALLOWS WAR POWERS TO BE INTERMIXED AND USED AS AN ENUMERATED POWER

A. The 1871 Indian Policy

After the Civil War, Congress changed federal Indian policy. The 1871 policy ended treaty making with the Indian tribes. This formally ended the assimilation policy of the Northwest Ordinance and began a much harsher direct war power policy toward the Indians. See 25 U.S.C. § 71, 1 Rev. Stat. § 441 and § 442. *See also U.S. v. Lara*, 541 U.S. 193, 201 (2004). The Indian policy of 1871 was based on all Indians and Indian tribes as a race being potential belligerents against the authority of the United States. This change happened because so many Indian tribes raised

hostilities during the Civil War. Many Indian tribes formed alliances with the Confederate States. *See Holden v. Joy*, 112 U.S. 94 (1872). This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War and to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. With the policy shift the Civil War ended and the Indian Wars began. Under the 1871 policy even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only Congress could change his status and grant citizenship. *See Elk v. Wilkins*, 112 U.S. 94 (1884).

By the 1880's senior members of Congress were intentionally going around the 1871 Indian policy and trying to fulfill the promises that had been made to friendly Indian tribes under the original assimilation policy. *See Nebraska v. Parker*, 136 S.Ct. 1072 (2016). This attempt to return to the assimilation policy was incorporated into the Dawes or General Allotment Act of 1887. At the same time, many other members of Congress were more than hesitating to relinquish the essentially unlimited authority they possessed over Indians from the 1871 policy. This was the creation of the schizophrenic federal Indian policy that still exists today. This schizophrenic dual Indian policy created the basis of the plenary power this Court attributed to Congress in *United States v. Kagama*, 118 U.S. 375, 380 (1886). The reality is that from the beginning this Court knew the plenary power was actually the acquiescing of this Court to allowing war powers to apply intermixed with the enumerated federal powers of the

Constitution. "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell." *Kagama* at 384.

Just four years before *Kagama*, this Court refused to acquiesce to the war power being mixed with the Civil War amendments to create plenary authority in *United States v. Harris*, 106 U.S. 629 (1882). Similarly, the decision in *Ex Parte Crow Dog*, 109 U.S. 556 (1883) held the line on federal authority. Whatever the reason for the complete change of position of this Court the end result was that the constitutional constraints on federal authority were rendered unenforceable in any court of law. Many scholars today link the change of position to how the 1871 Indian policy started the Indian wars and then brought on an era of imperialism. See generally "How the Civil War Became the Indian Wars," New York Times Opinionator May 25, 2015 by Boyd Cothran and Ari Kelman, http://boydcothran.com/2015/05/27/how-the-civil-war-became-the-indian-wars/.

It was not only Congress that was beginning to relish this virtually unlimited authority over the Indians and explore new possibilities of applying it. According to the historical documents the United States Department of Justice with all of its attorneys was also seeing all the possibilities. When this Court acquiesced to Congress having plenary power it effectively gave the Executive branch the same unlimited authority. Every federal department and agency is represented by DOJ. DOJ always has senior counsel assigned whose role it is to advise Congress and to handle their specific inquiries. William H. Veeder himself held that role for DOJ from 1946-1952. During

his time as the DOJ liason to Congress he met and began working with Congressman Richard M. Nixon. DOJ also advises all departments and agencies on all constitutional law and jurisdictional regulations. In this case it is a National Park Service regulation, 36 C.F.R. 1.2(a)(1) and (3) that is the basis for claiming federal jurisdiction over the navigable waterway. This regulation may have been promulgated by the National Park Service but its jurisdictional reach and its defense are all controlled by the DOJ. When only one law firm represents all of the interests of the federal government a grant of authority to one part is going to apply to all of it, especially when the one law firm is itself a major part of the Executive branch. The DOJ advocates for its client and that includes every law passed by Congress and enforced by the Executive. It would violate its advocacy duty to its client if it chose to apply constitutional restraints not currently required by the law according to the federal courts.

As argued by the DOJ, there is no physical location anywhere within the territorial boundaries of the United States that is not subject to federal preemption if a Native American ever crossed over it when the federal government has plenary power. CERF has for many years been referring to this within our organization as the federal moccasin theory. Any place ever occupied or potentially used by Indians can be argued to be reserved to the United States. The DOJ strongly makes this argument in Federal Brief of Respondents in Opposition p. 3-4. On physical land this federal preemption is manifested by designating an area "Indian country." See generally 18 U.S.C. § 1151. This criminal statute incorporates the jurisdictional decision in *United States v. Kagama* that the Congress has plenary authority over Indians to uphold the

constitutionality of the Major Crimes Act that removed state jurisdiction over major crimes committed by Indians on federal land and Indian reservations. Not long after federal preemption was created on land the DOJ manipulated to create the federal reserved rights doctrine on water using an identical legal argument linked to the Indian treaties as federal statutes under federal plenary authority as decided in *Kagama*. *See United States v. Winans*, 198 U.S. 371 (1906). This was quickly followed by the claim that there was implied reservation of water when an Indian reservation was created that could displace state conferred private property water rights. *See Winters v. United States*, 207 U.S. 564 (1908).

In this case Mr. Sturgeon has argued that the issue is whether the National Park Service regulation claiming jurisdiction over the waterways in Alaska within the National Conservation Area (NCA) exceeds the authority of the National Park Service. But there is a preliminary question that raises the same jurisdictional question raised in *United States v. Kagama*, over the authority of Congress to legislate and claim exclusive federal jurisdiction over a federally reserved area within a sovereign state. The way the question has been presented in this case it assumes that Congress has the plenary authority to enact the ANILCA. Admittedly Congress enacted legislation that tried to protect the public trust responsibilities of Alaska in ANILCA. The DOJ has interpreted ANILCA as an assertion of the preemptive authority of Congress over the NCA's and advised the National Park Service that it has preemptive authority to promulgate the current regulation under the federal reserved water rights doctrine. This case cannot be resolved with an

enforceable decision by this Court without addressing the plenary authority of Congress over the Indians.[2]

B. The 1930 Federal Irrigation Water Rights Memorandum

It requires reading the memorandum on Federal Irrigation Water Rights attached to this brief as Appendix a to see just how the federal reserved rights doctrine is used by the DOJ to completely preempt state jurisdiction over water. It is important that this Court realize that the claimed federal authority is plenary and the reasoning to assert the plenary authority is infinitely flexible. Counsel reminds this Court that this is a Memorandum dated January 22, 1930 and that the United States undoubtedly claims more than this today. The reasoning in the 1930 memorandum is more detailed than the reasoning applied by the Ninth Circuit in this case. The difference is that the 1930 memorandum tries to justify or interpret how separate constitutional powers were combined to claim ownership of all water while the Ninth Circuit erroneously assumes that the Commerce Clause power always included these other constitutional powers.

Attorney Ethelbert Ward states that the federal reserved water rights doctrine was established when this Court opined that "Although this power of changing the common law rule as to the stream within its domain undoubtedly belongs to each State, yet two

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[2] The assertion of the plenary authority is the reason that the DOJ has refused to enforce *Carcieri v. Salazar*, 555 U.S. 379 (2009). According to DOJ there is always going to be an alternative interpretation of any law that is within their authority to make if it comes under their preemptive plenary authority.

limitations must be recognized: First, that in the absence of specific authority from Congress, a State by its legislation cannot destroy the right of the United States, as the owner of lands bordering on streams, to the continued flow of its water so far at least as may be necessary for the beneficial uses of the government property..." U.S. v. Rio Grande Dam and Irrigation Co., 174 U.S. 690, 703 (1899). Appendix at 13aa . This language is exactly the same as that found in *Kagama* to justify the use of plenary power. *Kagama* at 380.

This memorandum on Federal Irrigation Water Rights goes much further than just asserting these rights within federal irrigation projects. The first sentence "The United States is the owner of the unappropriated waters in the non-navigable streams in the public land States of the arid West." sets the stage. App. at 1aa. As just stated above, the United States claimed all of the unappropriated waters of the Rio Grande even though they had argued in this Court that the Rio Grande was a navigable river. But to claim all of the unappropriated waters according to this analysis the United States also had to be claiming that the Rio Grande was non-navigable. The Ward memorandum explains how the United States can use either argument navigable or non-navigable to gain the same results on federal reserved rights. "Even in the States where the appropriation system prevails, the United States continues to hold its land and waters as a riparian proprietor at common law." App. at 5aa.

In describing how to interpret the Act of 1866 Attorney Ward said: "By the Act of 1866, Congress made the State its agent by requiring compliance with 'local customs, laws and the decision of the courts' before the individual could acquire a right and title to the Government's unappropriated waters." App. at 9aa-

10aa (emphasis in original). Ward continued "The Supreme Court held in a well considered case that the provisions of the mining law, which are similar to the provisions in Sec. 9 concerning water rights, made in effect the States and Territories the agents of the United States to enact and enforce local rules under which, within the limits fixed by Congress, these mineral rights must be acquired and enjoyed. The same rule applies to the water provisions of the Act of 1866. The State acts as the agent of the United States. Butte City Water Co. v. Baker, 196 U.S. 119, 126." App. at 11aa. (Emphasis in original). Butte City says nothing about a State acting as an agent for Congress or the United States. The case could be construed as an early example of cooperative federalism.

The Ward memorandum sets out in exacting detail how the law and decisions by this Court through 1930 can be interpreted by the federal attorneys to further the federal reserved water rights doctrine. "The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied, and could not be. United States v. Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. Winters v. United States, 207 U.S. 564, 577 (1908)." App. at 13aa. The Ward memorandum then continues into how Section 8 of the Reclamation Act of 1902 also does not change any of the claims to federal reserved water rights. App. at 16aa-17aa, 20aa. This interpretation of Section 8 is eerily similarly to how the Congressional safeguards in ANILCA are deemed irrelevant. Just as in the earlier cases the DOJ defends this latest expansion of the federal reserved rights

doctrine to this Court to receive its tacit approval that this latest expansion is now the law if Mr. Sturgeon loses.

The federal reserved water rights doctrine was developed to preempt the authority of the States and alter the constitutional structure using the plenary powers according to this 1930 memorandum.

II. IS THIS COURT READY TO IMPOSE THE CONSTITUTIONAL LIMITS ON FEDERAL AUTHORITY?

In *Murphy v. NCAA* the majority struck down as unconstitutional provisions in the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. §3701 et seq. passed some 30 plus years ago that purported to allow the Congress to prohibit state legislatures from legalizing off site sports betting within their respective States. The reasoning of the majority was taken from the federalism argument adopted by the Rehnquist Court in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). The *Murphy* Court changed the prohibition against compelling or coercing a state to administer a federal program into a more defined line—the Congress has no power to commandeer any state legislative function that it cannot federally preempt using a direct authority granted to it under the federal Constitution. "The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States." *Murphy* at 1475. Justice Alito spent considerable effort defining appropriate federal

preemption in the majority opinion, "the legislative powers granted to Congress are sizable but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority." *Murphy* at 1476.

The anticommandeering doctrine has the potential to be more enforceable than the old equal footing doctrine. The equal footing doctrine relied on the requirement to dispose of the territory and create new States in the Property Clause, Art. IV, Sec. 3, Cl. 2. The United States was allowed to retain territorial land only on a temporary basis in a case that determined that States owned the bed and banks of a navigable waterway. *See Lessee of Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221 (1845). The specific requirements set in that case became known as the American public trust doctrine. The main concept was that the federal government could exercise plenary power over a territory but that upon the formal creation of the territory by Congress certain powers and ownership over the water would vest in the future state. This insured that all States would be admitted on an equal footing with the existing states. Before the Civil War Amendments and the end of slavery this was the only way to enforce the Framer's view that all people had to be equal before the law. When this Court acquiesced to Congress having continuing plenary authority over Indians, it nullified the equal footing doctrine because

Congress no longer had to dispose of any federal territory, it could retain all federal territory indefinitely. This completely contradicts the bedrock principle "that each State is entitled to the sovereignty and jurisdiction over all territory within her limits." Lessee of Pollard v. Hagan, 3 How. 212, 228 (1845).

The main principal of the anticommandeering doctrine is that neither the Congress or any part of the national government has the authority to require a State or State official to act as an agent of the United States to enforce a federal law. *Murphy* at 1476-1477. As stated in the Federal Irrigation Water Rights memorandum the plenary authority flips the primary ownership of the water from state to federal and converts the state laws on acquiring a water right into laws passed as agents of the United States to comport to federal laws. This is much more than claiming a federal reserved right for a particular purpose. This is the deliberate destruction of the dual sovereignty role of the states as defined in *Lessee of Pollard*. The use of the plenary power to create the federal reserved water rights doctrine to destroy state legislative jurisdiction over property that is supposed to belong to the State must violate the anticommandeering doctrine.

This case is again before this Court because the territorial sovereignty of Alaska has been commandeered. As explained above, the commandeering of state legislative jurisdiction is really coming from the assumption by Congress that it could dictate the terms of Alaska's land use after Alaska was granted statehood in passing ANILCA. If this Court chooses to declare parts of ANILCA unconstitutional for exceeding the authority of Congress it would still have to give Congress some time to dispose of the federal territory as required by the Property Clause.

Congress did many things right in the way it went about writing and passing ANILCA in including State officials in the discussion of the bill. ANILCA could be interpreted as a temporary law to manage the federal territories until they are formally disposed. If ANILCA is a temporary law to prevent misuse of the federal public land it does not require the plenary authority to be constitutional. Congress has authority to protect the remaining federal public land and can do so in a coordinated manner with the State of Alaska. Political accountability federalism does not cancel out cooperative federalism as long as the state legislative functions are not commandeered.

This reinterpretation of ANILCA would make the National Park Service regulation *ultra vires* in Alaska and throughout the United States. If Congress does not have plenary authority then neither does the Executive branch. If there is no authority to promulgate the regulation it cannot preempt state jurisdiction. Such a ruling would implicate the federal reserved water rights doctrine but would not require an immediate overruling of *Winters* and *Winans*. Congress could attempt to pass legislation that federal reserved water rights are based on the Indian Commerce Clause. There is no reason for the Court to guess at how Congress will react. It can allow the law to be adjusted incrementally as the cases and controversies arise.

III. IF THIS COURT APPLIES *MURPHY v. NCAA* TO RESOLVE THIS CASE IT SHOULD ADDRESS THE LEGAL STATUS OF THE INDIANS IN THE OPINION

For more than 20 years the Citizens Equal Rights Foundation (CERF) has been presenting *amici curiae* briefs to this Court requesting that this Court reexamine its prior cases granting plenary authority to the Congress and Executive branch over Indians under current federal Indian policy. In the last three terms, in several opinions regarding Puerto Rico and water law this Court has called into question the continuing plenary authority of the United States over federal territory. One of those cases was the earlier version of this case. The Chief Justice himself warned the Ninth Circuit Court of Appeals in the unanimous opinion that further expanding the federal reserved water rights doctrine would have great implications but did not articulate what those implications would be. The Ninth Circuit upon rehearing chose to ignore the warning and has greatly expanded the federal reserved water rights doctrine to now include full plenary authority under the Commerce Clause. Now this Court must either capitulate to this end of the state public trust doctrine over water as the Ninth Circuit has defined it or confront the claimed federal plenary authority over Indians that has expanded to this point. There is no place left in the Ninth Circuit decision for any claim of state sovereignty over water in Alaska if the reasoning of the Ninth Circuit stands.

In the *amici curiae* brief at the petition stage these *amici* raised the issue of how the plenary power has allowed the Congress to change the citizenship status of any American and cited to the cases that

allowed Japanese citizens to be legally detained during World War II. The 1871 Indian policy was justified and upheld in principle in *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944) and applied to all persons of Japanese ancestry. This thinking is as crazy as believing that the federal Indian policy of 1871 that still underlies current federal Indian policy was defined and designed to help the Indians. As William Veeder himself found out, nothing is further from the truth. Native American citizens living on federal Indian reservations still have no constitutional rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). If this Court applies the new federalism to end the plenary power of Congress and begins to restore state sovereignty it needs to also address the fact that without the plenary power that no branch of the United States government has the authority to continue to treat Native Americans or the citizens of our other territories in Guam and Puerto Rico as second class citizens. This Court should hold that all persons living within the boundaries of the United States are entitled to the same rights under the Constitution of the United States. Restoring the constitutional structure makes the federal government and this Court politically accountable to the people. It also restores the liberty interest of Mr. Sturgeon and begins restoring the concept of liberty for all Americans.

Political accountability federalism is not a "States Rights" argument to bring back a mode of thinking that should have ended with the Civil War. Political accountability federalism is based on a constitutional structure designed by the Framers that integrated two systems of government to prevent either government from gaining too much power and

threaten self government of the people. The original accountability federalism argument was developed using a model of the constitutional structure as a simple electronic integrated circuit. The reason this is important is that the modern integrated circuit was not invented until 1968 in Silicon Valley where the original author grew up. The integrated circuit is the building block of the electronic age that has so changed our world and brings such huge innovations. The Constitution may be over two hundred years old but if restored to its original structural design by removing the plenary power short circuit it is still as viable as it was when written. Maybe more viable because we now have the electronic verbiage to explain how and why it works.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,
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MEMORANDUM

FEDERAL IRRIGATION WATER RIGHTS

by

ETHELBERT WARD, January 22, 1930.

The United States is the owner of the unappropriated waters in the non-navigable streams in the public land States of the arid West. This means, for practical purposes, in part, as follows:

1. The United States prescribes the method by which the right to use such unappropriated waters may be acquired.

2. The United States may reserve from further appropriation so much of such unappropriated waters as may thereafter be needed for irrigation uses upon an Indian reservation.

3. The United States may reserve from further appropriation so much of such unappropriated waters as may thereafter be needed for irrigation uses upon the Government's Reclamation Project.

The United States originally owned all the lands in the arid West as a common law proprietor as well as a sovereign proprietor. At the English common law the sovereign owned and controlled the beds of navigable tide waters, while the beds and waters of non-navigable (fresh water) streams were owned and controlled by the proprietor of the lands through which such streams ran. The term "fresh water" used in the common law referred to streams where the tide did not flow; and in England were all non-navigable. The Supreme Court of the United States has extended the common law rule of

navigable tide water to navigable fresh water streams such as the Mississippi and Columbia Rivers.

Shively v. Bowlby, 152 U. S. 1, 13-15.

At common law the waters of a non-navigable (fresh water) stream belong to the owners of the riparian lands.

> Fresh waters of what kind soever do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the propriety of the soil usque filium aquae, and the owners of the other side the right of soil or ownership unto the filium aquae on their side. And if a man be owner of the land on both sides, in common presumption he is the owner of the whole river according to the extent of his land in length.

Hale's De Jure Maris, Chap. 1.

When the Western States were admitted into the Union these states acquired all the sovereign rights of the English Crown theretofore possessed by the United States, except such sovereign rights as were retained by the United States under the Constitution.

> For when the revolution took place, the people of each States became themselves sovereigns; and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by

the Constitution to the general Government.

Martin v. Waddell, 16 Pet. 367, 410.

Shively v. Bowlby, 150 U. S. 1, 14-15

One of the sovereign rights acquired by the new States was the title and control of the beds of navigable waters, subject to the Federal paramount navigation control. The new States did not acquire any ownership in the waters of non-navigable (fresh water) streams because that was not a sovereign right of the English Crown. Such waters belong to the proprietor of the riparian lands. That proprietor was the United States.

Hale's De Jure Maris, Chap. 1.

The Supreme Court of the States of New York, one of the original thirteen States, holds:

> "Fresh rivers of what kind soever do of Common right belong to the owners of the soil adjacent", is the expressive language of the common law and is of universal application.
>
> Smith v. Rochester, 92 N. Y. 463, 473.

The Supreme Court of Massachusetts, another one of the thirteen original States, holds:

> It is to be noticed, first that the nature of their ownership on the border of tidewater differs from the ownership of a riparian proprietor upon an innavigable river or small stream. The title of the owner in the latter case goes to the thread

> of the stream, he owns all of the land under the water with a right to the flow of the water which goes with the land as a part of the real estate included in his ownership. The State has no ownership of any part of these small streams, nor any control over them except such as it has in all parts of its domain for governmental purposes.
>
> Home for Aged Women v. Commonwealth, 202 Mass. 422,

Some of the State courts in the arid West seem to think that irrigation was unknown or impossible at common law, and that a riparian proprietor had no right to use the water of a stream for irrigation, because, according to their ideas of the common law, the riparian proprietor must let the water flow past his lands unpolluted in quality and undiminished in quantity.

For instance, the Supreme Court of Colorado says:

> A riparian proprietor, owning both sides of a stream, may divert water therefrom, providing that he returns the same to the natural stream before it leaves his own land so that it may reach the riparian proprietor below without material diminution in quantity, quality or force.
>
> Oppenlander v. Ditch Co., 18 Colo. 142, 148.

It is suggested on behalf of the appellants that the use of water for

irrigation was practically unknown to the common law. But, while it may be true that it is seldom necessary or desirable to irrigate land in England by artificial means, yet it appears that a reasonable use of running streams for the purpose by riparian proprietors is recognized by the Courts of that county. It is expressly so stated in Gould on Waters, where a number of English cases are cited; and in Pomeroy on Riparian Rights it is declared that the common law rule that every proprietor has an equal right to the use of water as it is accustomed to flow, without diminution or alteration is subject to well-recognized limits that each owner may make reasonable use of the water for domestic, agricultural and manufacturing purposes; and the author there cites several English and American decisions in support of that declaration.

Benton v. Johncox, 17 Wash. 277, 289.

Gould on Waters, Sec. 217.

Pomeroy on Riparian Rights, Sec. 125.

Wiel on Water Rights (3rd Ed.) 807, 815, 818, 819.

Jones v. Conn, 39 Ore., 30, 36.

Clark v. Allaman, 71 Kans. 206, 241.

Even in the States where the appropriation system prevails, the United States continues to hold its land and waters as a riparian proprietor at common law.

> Although this power of changing the common law rule as to the stream within its domain undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on streams, to the continued flow of its water so far at least as may be necessary for the beneficial uses of the government property****
>
> U. S. v. Rio Grande Irr. Co., 174 U. S. 690, 703.
>
> Gutierrez v. Albuquerque Co., 188 U. S. 545, 554.
>
> The Congress shall have power to dispose of and make all needful rules and regulations regarding the Territory or other property belonging to the United States.
>
> U. S. Constitution. Art. IV, Sect. 3, Par. 2.

In about 1836, it seems that the State of Illinois conceived the notion that the United States held the public lands in the Northwestern territory solely in trust for the State; that the words of the Constitution, "to dispose of" meant only to sell; and that the future state had some sort of a claim or interest in the

minerals in the public lands which prevented the United States from reserving or leasing such mineral lands. The Supreme Court held that the term "territory" in the Constitution meant lands, and that words "to dispose of" meant to reserve, lease, sell, or otherwise handle without let or hindrance.

> U.S. v. Gratiot, 14 Pet. 526, 537-8, (Decided in 1840).

This early case is interesting in view of the claims now made by the Western States that the United States held the waters of non-navigable streams in trust for the future state, and that the ownership of such waters went to the States.

The exclusive Constitutional power of Congress to dispose of the public domain and other property of the United States has been upheld time and again by the Supreme Court.

> No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.
>
> Gibson v. Ghouteau. 13 Wall. 92, 99.

These are rights incident to a proprietor, to say nothing of the power of the United States as a sovereign over the property belonging to it.

Light v. U. S. 220 U.S. 523, 537.

Prior to the Mexican war, and for some years thereafter, the appropriation system, regardless of ownership of riparian lands, was practically unknown in the United States. During that period riparian rights attached both to privately owned lands and to the public lands of the United States. Congress, as early as May 18, 1796, recognized this right by enacting

> That all navigable rivers within the territory to be disposed of by virtue of this Act, shall be deemed to be and remain public highways and that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall become common to both.

Act of May 18, 1796, 1 Stat. 468.

The above Act applied to lands in the Northwest Territory. Later Congress enacted what is now Revised Statutes, Sec. 2476, where the rule is extended to all public lands.

As non-riparian settlers in California and elsewhere in the West had for a number of years appropriated the public waters of the United States, regardless of the riparian proprietary rights of the United States, and vast mining and agricultural interests were dependent thereon, Congress gave relief by passing the Mining and Water Act of July 26, 1866 (14 Stat. 451). This Act ratified and validated prior appropriations and provided a method by which such rights could in the future be acquired from the United States. Sec. 9 of that Act provides:

> That whenever by priority of possession, rights to the use of water for mining, agriculture, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same ***
>
> Act of July 26, 1866, Sec. 9 (14 Stat. 451)

Section 17 of the Act of 1870, amends and interprets Section 9 of the Act of 1866, as follows:

> *** and all patents granted, or preemption of homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may be acquired under or recognized by the ninth section of the Act of which this Act is amendatory ***
>
> Act of July 9, 1870, Sec. 17 (16 Stat. 217)

Without citing the numerous court decisions which discuss the meaning of this Act, it is sufficient to state that Congress thereby provided the way by which persons should in the future acquire the right and title to use the unappropriated waters of the United States flowing upon its public lands. The Act is prospective in its operation.

Jacob v. Lorenz, 98 Calif. 332, 335-6.

Beaver Brook Co. v. St. Vrain, 6 Colo. App. 130, 138.

By the Act of 1866, Congress made the State its agent by requiring compliance with "local customs, laws and the decisions of courts" before the individual could acquire a right and title to the Government's unappropriated waters. The United States have never granted its waters to any State. The unappropriated waters, or the waters that have not been granted by the United States still belong to the United States.

> The waters in question were a part of an innavgable stream, the title to which was never acquired by any State, but remained in the Federal Government.

Anderson v. Bassman, 140 Fed. 14, 20.

> The water in an innavigable stream flowing over the public domain is a part thereof, and the national Government can sell or grant the same, or the use thereof, separate from the rest of the estate under such conditions as may seem to it proper.

Howell v. Johnson, 89 Fed. 556, 558.

> As the United States then owns the waters which are incident to its lands, it dispose of them separate from its lands if it chooses.

Cruse v. McCauley, 96 Fed. 369, 374.

> It was apparent to Congress, and indeed to everyone, that neither the local customs nor State laws nor decisions of State courts could vest the title to public land and waters in private individuals without the sanction of the owner, viz: the United States.
>
> Benton v. Johncox, 17 Wash. 277, 289.

It will be noted that the Act of 1866 refers principally to mining, and that the same provisions are inserted in that Act regarding compliance with local customs, laws and the decisions of courts before mining rights could be acquired. The Supreme Court held in a well-considered case that the provisions of the mining law, which are similar to the provisions in Sec. 9 concerning water rights, made in effect the states and Territories the agents of the United States to enact and enforce local rules under which, within the limits fixed by Congress, these mineral rights must be acquired and enjoyed. The same rule applies to the water provisions of the Act of 1866. The State acts as the agent of the United States.

> Butte City Water Co. v. Baker, 196 U.S. 119,126

It will be noticed that the Act of 1866 provides for the issue of a patent by the United States for the mining claim, if the locator desires a patent; or the locator can hold the claim under possessory rights. No provision is made for the issuance of a patent for a water right. Congress evidently thought it wiser to grant a possessory right to the use of the water so long as the claimant complied with "local customs, laws and

decisions of courts". The Act of 1866 is the claimant's title deed to water. The grant is in the Act itself, the highest kind of a patent.

> A water right can, therefore, be acquired only by the grant, express or implied, of the owner of the lands and water. The right acquired by appropriation and use of the water on the public domain is founded on the grant from the United States as the owner of the land and water. Such grant has been made by Congress.
>
> Smith v. Denniff, 24 Mont. 20, 21.
>
> Union Co. v. Ferris, 2 Sawyer 176, 184.

In appropriation States the United States still holds its undisposed of waters as a riparian proprietor regardless of State laws. The Supreme Court says:

> Although this power of changing the common law rule as to the streams within is domain undoubtedly belongs to each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on streams, to the continued flow of its waters so far at least as may be necessary for the beneficial uses of the Government property***
>
> U.S. v. Rio Grande Irr. Co., 174 U.S. 690, 703.

Gutierrez v. Albuqueque Co., 188 U.S. 545, 554.

INDIAN RESERVATIONS.

By the establishment of an Indian Reservation the United States, as the owner of the unappropriated waters in the adjacent non-navigable streams, reserves from further appropriation so much of such waters as will in the future be needed for the lands of the reservation.

> The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied and could not be. United States v. Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years.
>
> Winters v. U.S., 207 U.S. 564, 577.

The Federal decisions on the water rights of the United States for the Indian reservations are the following:

1901. U.S. v. Morrison, 203 Fed. 364 (Colo.)

1906. Winters v. U.S., 143 Fed. 740 (Mont.)

1906. Winters v. U.S., 148 Fed. 684 (Mont.)

1907. U.S. v. Conrad, 156 Fed. 123 (Mont.)

1908. Winters v. U.S., 207 U.S. 564 (Mont.)

1908. Conrad v. U.S., 161 Fed. 829 (Mont.)

1918. U.S. v. Wightman, 230 Fed. 277 (Ariz.)

1922. Skeem v. U.S., 273 Fed. 93 (Idaho)

1926. U.S. v. Parkins, 18 F (2d) 642 (Wyo.)

1928. U.S. v. Hibner, 27 F (2d) 909 (Idaho)

U. S. District Judge Hallett of Colorado held in 1901:

> The Acts of Congress and of the State Assembly relating to appropriation of Water for irrigating lands were made for and are applicable only to cases arising between citizens. They have no application whatever to the case in which water is appropriated to a public use by the Government in the exercise of its sovereign authority over the Indian tribes.

U.S. v. Morrison, 203 Fed. 364, 366.

RECLAMATION PROJECTS.

Act of July 2,1902 (32 Stat. 388).

The same rights and powers of the Unites, upon which the Winters case is based, apply to the reservation of waters for the Government's reclamation

projects. It seems that only one case is found in the printed reports of Federal decisions which announces the rule above stated as applicable to the Government's reclamation projects. This was one of Mr. B. E. Stoutemyer's early cases decided in 1910. That opinion is by the United States Circuit Court of Appeals, 9th Circuit. It says:

> That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular beneficial purpose, was held by this court in Winters v. United States, 143 Fed. 740, and 148 Fed. 684. This decision was affirmed by the Supreme Court of the United States in Winters v. United States, 207 U.S. 564, 577, where the Court said:
>
> "The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied and could not be. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702; U.S. v. Winans, 198 U.S. 371."
>
> To the same effect was the decision of this Court in Conrad Inv. Co. v. U.S., 161 Fed. 829, 831.
>
> Burley v. U.S., 179 Fed. 1, 12.

It seems that the authorities cited in this memorandum, relating to the ownership by the United States of the unapproprated waters in the non-navigable streams and its power to reserve the same

for beneficial Governmental purposes, are sufficient to establish the proprietary and sovereign rights of the United States. I shall, therefore, not repeat those decisions here.

Judge Cavender of the State District Court of Colorado held in 1912 for the Government's Grand Valley Project, and again in 1913 for the Government's Uncompahgre Project, that the United States owned the unappropriated waters of the non-navigable streams in Colorado, and by establishing a reclamation project had reserved so much of said unappropriated waters as were needed for the project. Following these decisions the Attorney General announced his approval of the doctrine in his Annual Report for 1914, at page 39.

Special Master George F. Talbot of the United States District Court of Nevada has announced the same rule. See his Explanatory Report in the case of U.S. v. Orr Water Ditch Co., Departmental File No. 182979. The decree prepared by him enforcing this right of the Government has been temporarily enforced during the past four years by the United States Judge of Nevada.

Section 8 of the Reclamation Act.

Counsel opposing the Government's water rights always rely upon Section 8 of the Reclamation Act as a relinguishment of the Government's proprietary and sovereign rights over its waters and as a mandatory compliance by the United States at its peril with State water laws. The pertinent portions of Sec. 8 are as follows:

> Sec. 8: That nothing in this Act shall be construed as affecting or

> intending to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired there under, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator or user of water in, to, or from any interstate stream or the waters thereof***.
>
> Act of July 2, 1902, Sec. 8 (52 Stat. 388, 390.)

The first part of Section is a re-affirmance of the Government's guaranteed protection of the water rights recognized and validated by the Act of 1866, and water rights thereafter to be acquired from the United States under the provisions of Section 9 of the Act of 1866 by conformity with "the local customs, laws and decisions of courts."

The Secretary of the Interior, in carrying out the provisions of the Reclamation Act is directed to conform with the State water laws provided that such conformity shall not in any way affect any right of the Federal Government.

There are many proprietary, constitutional and sovereign rights of the Federal Government that would be seriously affected by strict conformity with State water laws and the rules and regulations of States

Engineers—such as appropriation permits and time limits for completion of works and application of water.

For illustration, the first requirement of the laws of most of the appropriation States is that the prospective user must obtain a permit to "appropriate" the desired water. An "appropriation" of water means the taking of the steps required by the "local customs, laws and the decisions of courts" of the State, by which the title to the right to use the water—a real property right—vests from the Federal Government to the individual—"whereby the appropriator is granted by the Government the exclusive use of the water."

Monte Vista v. Centenial Ditch Co., 22 Colo. App. 364, 370.

There is no need that the Government should appropriate or acquire title to that which it already owns, viz: the inappropriated waters which, by the establishment of a reclamation project, the Government reserves for the uses of its reclamation project.

> The Government has not to make a prior appropriation to enable it to obtain the use of the waters. It has only to take that which has been reserved or that which has never been subject to prior appropriation upon the public domain. It has only to come into its own when its needs may require—the Department of the Interior being the instrumentality by which it exercises that right and privilege—and all persons seeking appropriations from public streams must take subject to this paramount right.

U.S. v. Conrad Inv. Co., 156 Fed. 123, 129-130.

> It was, therefore, unnecessary for the Government to appropriate the water. It owned it already. All it had to do as to take and use it.

Story v. Wolverton, 31 Mont. 346, 353.

Winters v. United States, 143 Fed. 740, 747.

Section 8, in excepting conformity which will interfere with State rights or with Federal rights or with interstate stream rights, states these exceptions in the disjunctive. Separately stating these exceptions, we have:

1. Nothing herein shall affect any right of any State.

2. Nothing herein shall affect any right of the Federal Government.

3. Nothing herein shall affect any right of any land owner, appropriator, or user of water in, to, or from any interstate stream, or the waters thereof ****.

The Supreme Court of the United States has interpreted the language excepting interstate stream rights.

> Congress was solicitous that all questions respecting interstate streams thought to be involved in that litigation (Kans. V. Colo.) should be left to judicial determination unaffected by the Act,—in other words, that the matter be left just

as it was before. The words aptly reflect that purpose.

Wyo. v. Colo. 259 U.S. 419, 463.

Applying the same interpretation to the language excepting the rights of the Federal Government from the conformity provisions of Section 8, the Court undoubtedly would hold that Congress was solicitous that all questions regarding any rights of the Federal Government be left just as they were before the enactment of Section 8; and that the words "nothing herein shall in any way affect any right of the Federal Government" would aptly reflect that purpose.

We call attention to the numerous decisions regarding conformity with State laws as found in the Conformity Act in Revised Statutes, Sec. 914, and the Eminent Domain Act, Aug. 1, 1888 (25 Stat. 357).

I call special attention to the decision of Judge Lewis, now presiding judge for the 10th Circuit, in the case of U. S. v. O'Neill, 198 Fed. 677, 682-3, and the cases cited by him, especially the case of Hills & Co. v. Hoover, 220 U.S. 329, 336, and the decisions there cited. These decisions are to the effect that conformity with State law is not required where any right of the Federal Government is impaired thereby.

It, therefore, is evident that the conformity provisions of Section 8 are not mandatory, but merely directory and modal, provided that such compliance does not in any way affect any right of the Federal Government.

In actual practice, the Reclamation Service does "conform" with State laws in every way possible in

order to give notice to all of the water requirements of the Government for its projects.

Respectfully submitted,
(Sgd) Etherlbert Ward
Special Assistant to the Attorney General

Denver, Colorado,
January 22, 1930.